

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

VALERIE W. KIESEL,  
Plaintiff,  
v.  
MICHAEL J. ASTRUE,  
Commissioner of Social Security,  
Defendant.  
Case No.: C08-1800 CRD  
ORDER RE: SOCIAL SECURITY  
DISABILITY APPEAL

Plaintiff Valerie Kiesel appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) who denied her applications for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“SSA” or the “Act”), 42 U.S.C sections 401-33, and Supplemental Security Income (“SSI”) disability benefits under Title XVI of the SSA, 42 U.S.C. sections 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court REVERSES the Commissioner’s decision and REMANDS the case for further administrative proceedings.

## I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a fifty-three-year-old woman, forty-three years old at the alleged disability onset date. She has a graduate degree and has work experience as a general clerk and as a United States Naval officer.

Plaintiff applied for SSI and DIB in January 2003, alleging disability since July 1998. Her claim was denied initially and upon reconsideration, and she timely requested an ALJ hearing. On January 26, 2006, a *de novo* hearing was held before ALJ Adams. The ALJ heard testimony from a vocational expert and from Plaintiff, who was represented by counsel, Anne Kysar, Esq. Administrative Record (“AR”) at 56-81. The ALJ rendered an unfavorable decision on April 27, 2006. Plaintiff requested Appeals Council review; review was granted, the ALJ’s decision was vacated, and the case was remanded for further proceedings.

On March 6, 2007, a second hearing was held before ALJ Adams. The ALJ again heard testimony from a vocational expert and from Plaintiff, who was again represented by counsel, Anne Kysar, Esq. AR 26-55. The ALJ again rendered an unfavorable decision on May 14, 2007. Plaintiff requested Appeals Council review; review was denied, rendering the ALJ's decision the final decision of the Commissioner. 20 C.F.R. §§ 404.981, 422.210 (2006). On December 16, 2008, Plaintiff initiated this civil action for judicial review of the Commissioner's final decision.

## II. JURISDICTION

Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. sections 405(g) and 1383(c)(3).

### III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. section 405(g), this Court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

*Richardson v. Perales*, 402 U.S. 389, 402 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

#### IV. THE DISABILITY EVALUATION

As the claimant, Ms. Kiesel bears the burden of proving that she is disabled within the meaning of the Social Security Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (internal citations omitted). The Act defines disability as the “inability to engage in any substantial gainful activity” due to a physical or mental impairment which has lasted, or is

1 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§  
2 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments are  
3 of such severity that she is unable to do her previous work, and cannot, considering her age,  
4 education, and work experience, engage in any other substantial gainful activity existing in the  
5 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180  
6 F.3d 1094, 1098-99 (9th Cir. 1999).

7 The Commissioner has established a five-step sequential evaluation process for  
8 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
9 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
10 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at any  
11 step in the sequence, the inquiry ends without the need to consider subsequent steps.

12 Step one asks whether the claimant is presently engaged in “substantial gainful activity.”  
13 20 C.F.R. §§ 404.1520(b), 416.920(b).<sup>1</sup> In the present case, the ALJ found that Plaintiff had not  
14 engaged in substantial gainful activity since the alleged onset of the disability. AR 18, Finding  
15 2. At step two, the claimant must establish that she has one or more medically severe  
16 impairments, or combination of impairments, that limit her physical or mental ability to do basic  
17 work activities. If the claimant does not have such impairments, she is not disabled. 20 C.F.R.  
18 §§ 404.1520(c), 416.920(c). In this case, the ALJ found Plaintiff has the severe impairment of  
19 fibromyalgia. AR 19, Finding 3. If the claimant does have a severe impairment, the  
20 Commissioner moves to step three to determine whether the impairment meets or equals any of  
21 the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d), 416.920(d). A  
22 claimant whose impairment meets or equals one of the listings for the required twelve-month  
23 duration requirement is disabled. *Id.* Here, the ALJ found that Plaintiff’s impairments did not  
24 meet or equal the requirements of any listed impairment. AR 20, Finding 4.

25 When the claimant’s impairment neither meets nor equals one of the impairments listed  
26 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s  
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28 <sup>1</sup>Substantial gainful activity is work activity that is both substantial, *i.e.*, involves significant  
physical and/or mental activities, and gainful, *i.e.*, performed for profit. 20 C.F.R. § 404.1572.

1 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
2 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work to  
3 determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). The  
4 ALJ in this case found Plaintiff “has the residual functional capacity to [perform] a light level of  
5 physical exertion and, in the alternative, to [perform] a sedentary level of physical exertion.” AR  
6 20, Finding 5.

7 The ALJ next found that Plaintiff is unable to perform any of her past relevant work. AR  
8 23, Finding 6. If the claimant is able to perform her past relevant work, she is not disabled; if the  
9 opposite is true, the burden shifts to the Commissioner at step five to show the claimant can  
10 perform other work that exists in significant numbers in the national economy, taking into  
11 consideration the claimant’s RFC, age, education, and work experience. 20 C.F.R. §§  
12 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the  
13 claimant is unable to perform other work, the claimant is found disabled and benefits may be  
14 awarded. In this case, the ALJ found that Plaintiff could perform light or sedentary work at jobs  
15 such as an appointment clerk, a cleaner/housekeeper, or parking lot attendant. AR 24-25,  
16 Finding 10. The ALJ therefore concluded Plaintiff was not disabled as defined in the SSA. AR  
17 21.

## 18 V. ISSUES ON APPEAL

19 Plaintiff presents the following principal issues on appeal:

- 20 1. Did the ALJ err in assessing medical evidence from after the last insured date?
- 21 2. Did the ALJ err in not calling a medical expert to testify?
- 22 3. Did the ALJ err in assessing Plaintiff’s credibility?
- 23 4. Did the ALJ err in assessing lay witness statements?

## 24 VI. DISCUSSION

### 25 A. *The ALJ erred in assessing medical opinion evidence.*

26 Plaintiff alleges the ALJ erred in evaluating medical evidence obtained after the date she  
27 was last insured. Specifically, Plaintiff argues the ALJ did not give a sufficient basis for  
28 rejecting the medical opinions of Dr. West and Dr. Moore.

1 To reject an uncontradicted opinion of a treating or examining doctor, an ALJ must state  
2 clear and convincing reasons that are supported by substantial evidence. *Lester v. Chater*, 81  
3 F.3d 821, 830-31 (9th Cir.1995); *Magallanes*, 881 F.2d at 751-55. If a treating or examining  
4 doctor's opinion is contradicted by another doctor's opinion, an ALJ may only reject it by  
5 providing specific and legitimate reasons that are supported by substantial evidence. *Id.* The  
6 ALJ can meet this burden by setting out a detailed and thorough summary of the facts and  
7 conflicting clinical evidence, stating his interpretation thereof and making findings. *Magallanes*,  
8 881 F.2d at 751 (internal citations omitted). The rejection of an opinion of a treating physician  
9 based in part on the testimony of a nontreating, nonexamining medical advisor may be upheld.  
10 *Morgan v. Commissioner*, 169 F.3d 595, 602 (9th Cir. 1999), citing *Magallanes*, 881 F.2d at  
11 751-55; *Andrews*, 53 F.3d at 1043; *Roberts v. Shalala*, 66 F.3d 179 (9th Cir. 1995).

12 Dr. West

13 In December 2006, at the request of the ALJ<sup>2</sup>, Dr. West examined Plaintiff and diagnosed  
14 her with, among others, fibromyalgia. AR 972-75. Dr. West opined Plaintiff would at most be  
15 able to stand and walk for four hours in an eight-hour day, sit for 4-5 hours cumulatively in an  
16 eight-hour day, and occasionally lift and carry 12-15 pounds. AR 975. Dr. West indicated  
17 Plaintiff should not stoop, kneel, or crawl, and should not work around moving machinery or  
18 from heights. Dr. West also filled out a medical statement of ability to do work-related  
19 activities, opining similar limitations. AR 976-78.

20 The ALJ's discussion of Dr. West's opinion is, in full: "A later report from Raymond  
21 West, M.D., in December 2006, recapitulated the claimant's belief that she had all of the  
22 classical pressure areas for fibromyalgia, although the medical record for the time period in  
23 question does not contain any specific findings on this issue." AR 19. The ALJ makes no  
24 further mention of Dr. West's opinion but nonetheless concludes that fibromyalgia is a severe  
25 impairment. Regardless, the ALJ found that even with fibromyalgia Plaintiff retains the ability  
26 to perform light and sedentary levels of work. Plaintiff argues that Dr. West's opinion indicates  
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<sup>2</sup> Plaintiff's opening brief indicates the ALJ requested the examination.

1 she is unable to perform even sedentary work because, for example, she is unable to sit for six  
2 hours in an eight-hour workday as is required for sedentary work.

3 Defendant argues that the ALJ properly considered Dr. West's opinion and asserts that  
4 because the opinion was given after Plaintiff's date of last insured, it is therefore not probative of  
5 Plaintiff's abilities prior to that time. The Court does not agree. Dr. West examined Plaintiff for  
6 the express purpose of a medical opinion regarding her ability to work during the relevant period.  
7 The ALJ is required to provide at least specific and legitimate reasons for rejecting the opinion of  
8 an examining physician, regardless of when the opinion is given. The evidence was obtained  
9 outside the relevant period is not in itself a legitimate reason to reject it. The proper analysis first  
10 finds whether Dr. West's opinion is adopted or rejected based on its content. Any such rejection  
11 must be based on specific and legitimate reasons related to the basis of the opinion itself. If the  
12 opinion is not rejected for content, the issue of relevant time period may then arise. Here, the  
13 ALJ appears to reject Dr. West's opinion solely because he believes it pertains to Plaintiff's  
14 functioning beyond the relevant period. Indeed, the ALJ found fibromyalgia to be a severe  
15 impairment; however, did not specify a reason for not also adopting the higher level of limitation  
16 opined by Dr. West. The ALJ is required to set forth specific reasons for not adopting the  
17 limitations opined by Dr. West. The ALJ's failure to do so is harmful error. On remand, the  
18 ALJ will have the opportunity to either adopt the physical limitations opined by Dr. West, or  
19 provide specific reasons for not adopting them.

20 Dr. Moore

21 Plaintiff similarly argues the ALJ erred in assessing the opinion of Dr. Moore, a  
22 psychologist who also examined Plaintiff in December 2006. Plaintiff notes this examination  
23 was also conducted at the ALJ's request.

24 Dr. Moore examined Plaintiff and diagnosed her with dysthymic disorder, posttraumatic  
25 stress disorder, and assigned her a global assessment functioning ("GAF") score<sup>3</sup> of 55. Dr.  
26 Moore's findings state that: Plaintiff's intellectual functioning appear to be in the average range,

27 <sup>3</sup> According to the American Psychiatric Association, Diagnostic & Statistical Manual p. 34 (4th  
28 ed. 2000) (DSM-IV-TR), a GAF rating of 51-60 indicates moderate symptoms or moderate  
difficulties in social, occupational or school functioning.

1 however when in pain or fatigued she would be overwhelmed by information; she would be able  
2 to carry out simple instructions most of the time and complex instructions some of the time; she  
3 would be able to focus but her ability for more complex activities would vary with her level of  
4 discomfort; she was able to answer the doctor's questions for about an hour, but appeared  
5 haggard and fatigued and her ability to persist for longer is doubtful; she has good interpersonal  
6 skills but her chronic depression would mildly to moderately interfere with public interaction,  
7 coworkers and supervisors; she is unable to tolerate more than mild work pressure; she has an  
8 extensive history of physical, sexual and emotional trauma that has not been well treated, which  
9 could exacerbate her fibromyalgia, irritable bowel syndrome and chronic fatigue. AR 982-83.

10 The ALJ discussed Dr. Moore's report in total: "In December 2006, the claimant reported  
11 to Peter Moore, Psy.D., that 'headaches' began in 1996 (Ex. 18F). However, the medical record  
12 during the time period in question does not refer to this impairment." AR 20. The ALJ offered  
13 no further analysis of Dr. Moore's diagnoses or examination report and did not find any severe  
14 mental impairment.

15 Again, the ALJ is required to provide at least specific and legitimate reasons for rejecting  
16 the opinion of an examining physician. Here, the ALJ did not specify whether or why Dr.  
17 Moore's diagnosis of dysthymic disorder, posttraumatic stress disorder, and the opined low GAF  
18 score were rejected or given reduced weight, other than the ALJ's apparent belief that the  
19 impairments were outside the relevant time period. However, the ALJ is required to clearly set  
20 forth explicit reasons for rejecting the *basis* of the opinion. Although the doctors' examinations  
21 and opinions were given after the relevant time period, they are probative medical evidence  
22 regarding the alleged earlier-onset of disability. On remand, the ALJ will have the opportunity  
23 to assess the weight assigned to the mental limitations opined by Dr. Moore.

24 ***B. Medical Expert Testimony***

25 Plaintiff asserts the ALJ erred in not having a medical expert testify at the hearing.  
26 Specifically, Plaintiff argues that the record demonstrates that she is disabled and therefore a  
27 medical expert is required to determine her disability onset date. Defendant argues that the ALJ  
28 did not err in evaluating the evidence in concluding that Plaintiff is not disabled, therefore a

1 medical expert was not required.<sup>4</sup> As discussed above, the ALJ erred in evaluating the medical  
2 evidence from doctors West and Moore. On remand, should a full analysis of the medical  
3 evidence raise a question of disability onset date or should further clarification of Plaintiff's  
4 alleged impairments be necessary, the ALJ will obtain medical expert opinion. As ordered by  
5 the Appeals Council, the ALJ will "if necessary, obtain evidence from a medical expert to clarify  
6 the nature and severity of the claimant's impairments". AR 731.

7       C.     *Plaintiff's Credibility*

8 Plaintiff asserts that the ALJ erred in not providing sufficient reasons for finding her statements  
9 concerning the intensity, persistence and limiting effects of her symptoms not entirely credible.  
10 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a  
11 claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001); *Thomas*, 278  
12 F.3d at 958-59. In finding a claimant's testimony unreliable, an ALJ must render a credibility  
13 determination with sufficiently specific findings, supported by substantial evidence. "General  
14 findings are insufficient; rather, the ALJ must identify what testimony is not credible and what  
15 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834. "We require the ALJ  
16 to build an accurate and logical bridge from the evidence to her conclusions so that we may  
17 afford the claimant meaningful review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331  
18 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the ALJ may consider his  
19 reputation for truthfulness, inconsistencies either in his testimony or between his testimony and  
20 his conduct, his daily activities, his work record, and testimony from physicians and third parties  
21 concerning the nature, severity, and effect of the symptoms of which he complains." *Light v.*  
22 *Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). Additionally, an ALJ may not discredit a  
23 claimant's pain testimony solely on the ground that it is not supported by objective medical  
24 findings. *Fair v. Bowen*, 885 F.2d 597, 602 (9th Cir. 1989).

25       In this case, the ALJ indicates he based Plaintiff's adverse credibility finding on the lack  
26 of supporting objective medical evidence, and concludes that therefore Plaintiff's "claim for  
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28       <sup>4</sup> Defendant notes that the ALJ's decision contains errors regarding Plaintiff's original onset date  
of July 1998. On remand, the ALJ will clarify the alleged onset date being considered.

1 benefits rests upon her own statements and testimony concerning her condition 8 to 9 years ago.  
2 Her summoning of distant memories is not sufficient evidence to conclude that her fibromyalgia  
3 disabled her.” AR 22. The ALJ cites no evidence of malingering on Plaintiff’s part; therefore,  
4 the ALJ is required to present clear and convincing reasons for finding her claims less than fully  
5 credible. Here, the ALJ does not point to specific activities of daily living or inconsistencies in  
6 her testimony with the record (other than the stated lack of objective evidence). Defendant  
7 argues many reasons in support of the ALJ’s finding; however, the ALJ did not provide these  
8 reasons. The ALJ, not Defendant, is required to set forth clear and convincing reasons for  
9 rejecting a claimant’s testimony. As discussed above, on remand the ALJ will reassess the  
10 objective evidence provided by doctors West and Moore, and will have the opportunity to fully  
11 assess Plaintiff’s subjective complaints with respect to the total record and any other factors  
12 relevant to her functioning.

13       D.     *The ALJ erred in assessing lay witness statements.*

14 Plaintiff asserts that the ALJ failed to properly assess the lay evidence consisting of  
15 statements from her husband and two friends. Lay testimony as to a claimant’s symptoms is  
16 competent evidence that an ALJ must take into account, unless the ALJ expressly determines to  
17 disregard such testimony and gives reasons germane to each witness for doing so. *Lewis v.*  
18 *Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) (internal citations omitted).

19       The ALJ considered the lay statements but apparently did not accord them full credit.  
20 The ALJ noted that Plaintiff’s husband’s statement emphasized that clutter had built up in their  
21 home since her difficulties began; however, the ALJ found the statement flawed because his  
22 allegation and accompanying photos did not provide any evidence of disability during the  
23 relevant time period. AR 22-23. The ALJ noted the inscription on one photograph was taken  
24 five years after her date of last insured and the other photographs were undated and did not  
25 indicate why Mr. Kiesel himself had failed to clean the home and yard. *Id.*

26       The Court notes lay witnesses are not required to *prove* the accuracy of their statements.  
27 Mr. Kiesel’s statement is his opinion pertaining to the period at issue; as he testified that  
28 Plaintiff’s functioning decreased after her diagnosis of fibromyalgia in 1998. Although Mr.

1 Kiesel's statement may have not explained why he did not clean the house himself and the  
2 photographs may not necessarily prove Plaintiff's functioning during the relevant period, the  
3 witness's beliefs regarding Plaintiff's functioning during that time are relevant. Therefore, the  
4 Court finds the ALJ did not set forth a germane reason for rejecting Mr. Kiesel's statement. For  
5 example, the ALJ did not point to a conflict between the statement and other evidence of  
6 Plaintiff's functioning. Defendant argues that Mr. Kiesel's statement is unsupported by her  
7 medical record, however, the ALJ did not rely on this reasoning.

8 The ALJ notes that the letter from Plaintiff's friend, Ms. McGill, is "suspect" because it  
9 singles out June 1999, the exact time of Plaintiff's date of last insured. AR 23. The ALJ also  
10 took issue with the letter from Plaintiff's other friend, Ms. Hodge, because of a reference to her  
11 deteriorated functioning in 1999 without indicating whether it was before or after the June 30,  
12 1999 date of last insured. The ALJ's comments with respect to the two friends' statements are  
13 seemingly inconsistent; one is faulted for referencing the date of last insured and the other is  
14 faulted for not specifying whether it pertains to before or after the exact date of last insured. The  
15 Court finds the reasons the ALJ provided for not crediting the lay witness statements are not  
16 germane and are therefore in error. On remand, the ALJ will have the opportunity to either  
17 credit the lay statements or provide germane reasons for rejecting them.

## 18 VII. CONCLUSION

19 For the reasons set forth above, the Commissioner's decision is REVERSED and the case  
20 is REMANDED for further administrative proceedings.

21 DATED this 20<sup>th</sup> day of July, 2009.

22   
23 Carolyn R. Dimmick  
24 United States District Judge